SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-6191

H. CALLOWAY POLLARD, JR., *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JACK W. FLOYD
ERIC P. HANDLER
Smith, Moore, Smith, Schell & Hunter
Drawer G, Greensboro, N. C.
Attorneys for Petitioner,
H. Calloway Pollard, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, H. Calloway Pollard, Jr., respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 23, 1974.

CITATION TO OPINIONS

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, which was filed on September 23, 1974 but has not yet been officially reported as of the date of filing of this petition, is reproduced in Appendix A to this petition (Appendix A, p. 1a). The opinion, by Ward, J., of the United States District Court

for the Middle District of North Carolina, which denied petitioner's motion to dismiss the indictment, was filed on October 12, 1973, is reported *sub nom. United States v. Kernodle*, 367 F. Supp. 844 (M.D.N.C. 1973) and is reproduced in part in Appendix A to this petition. (Appendix A, pp. 4a-13a.)

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction, under 18 U.S.C. §371 and 18 U.S.C. §656, was entered on September 23, 1974. A petition for rehearing was timely filed in the Court of Appeals, and rehearing was denied by an order entered on October 23, 1974. An order staying issuance of the mandate until November 22, 1974 was entered on October 25, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does it constitute a subversion of the function of the grand jury, an abuse of the grand jury's process and the creation of an illegal and secret administrative subpoena for the Federal Bureau of Investigation, without the knowledge or approval of the District Judge or the United States Attorney, to obtain from the District Court a grand jury subpoena, signed in blank by the Clerk, and to direct such subpoena to a commercial bank requiring production of records in its possession but having completed and altered the subpoena to provide for its "satisfaction" by delivery of such records to the Bureau's agent in the field rather than to the grand jury or to the District Court?

2. In the seventy years since this Court last construed the offense of "willful misapplication" in *United States v. Britton,* 107 U.S. 655 (1883), there has arisen a clear conflict among the decisions of the United States Courts of Appeal as to whether the requirement laid down *Britton,* that an indictment charging this offense under 18 U.S.C. §656 must do so with specificity, continues to be binding; has he time now come, therefore, for this Court to resolve the conflict either by reaffirming its decision in *Britton* or by overruling it?
3. Does the offense of willful misapplication under 18 U.S.C. §656 include every "unauthorized, unjustifiable or wrongful use" of bank funds if done knowing that such transaction "somehow constituted a breach of bank laws or rules", or is the offense limited to those transactions which, at the time they occur, are obviously improper and subject the bank to an increased risk of probable and foreseeable loss; and, if the former, is not the offense unconstitutional and void for vagueness?
4. Does it violate the Fifth and Sixth Amendments for a defendant first to be denied all access to records or minutes of grand jury proceedings for the purpose of determining upon what theory it indicted, then to be denied a bill of particulars, and finally to be convicted upon theories of fact and law not even suggested on the face of the indictment?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constituion, Amendment V
United States Constitution, Amendment VI
18 U.S.C. §656
(Reproduced in Appendix B; pp. 1b-4b)

STATEMENT OF THE CASE

This petition seeks review by writ of *certiorari* of the judgment of the Court of Appeals for the Fourth Circuit affirming defendant Pollard's conviction of one count of conspiracy under 18 U.S.C. §371 and three counts of misapplication of bank funds under 18 U.S.C. §656.

Prior to the return of the indictment in this case, defendant Pollard had been a director of a state-chartered bank located in the Middle District of North Carolina and insured by the Federal Deposit Insurance Corporation.

Upon learning that the United States Attorney for the Middle District of North Carolina intended to present an indictment against him to the grand jury, the defendant moved the District Court first for an order requiring transcription of the grand jury's proceedings and thereafter for an order enjoining presentation to the grand jury of any evidence obtained by the government under a grand jury subpoena which had been signed in blank by the clerk and afterwards completed to state that it could be "satisfied" by delivery of the materials sought to an agent of the FBI in the field. Both motions were denied on July 10, 1973 and, while an appeal to the Fourth Circuit from such denial was pending, the grand jury returned the indictment upon which the defendant was later tried. The defendant then moved to dismiss the indictment and for discovery of any minutes or records of the grand jury's proceedings, both of which were denied by the District Court's Memorandum Order filed on October 12, 1973. (Appendix A, p. 4a). The defendant's petition to the Fourth Circuit for a writ of mandamus to review the order denying dismissal of the indictment was denied by an order of that Court filed on December 6, 1973.

The indictment contained one count charging conspiracy under 18 U.S.C. §371 and eighteen counts charg-

ing misapplication of bank funds under 18 U.S.C. §656, all naming as defendants the petitioner and three other persons. The first count, for conspiracy, charged that the four defendants and persons unknown had conspired to misapply bank funds and to defraud the United States with respect to its interest in the enforcement of "laws pertaining to the regulations [sic] of banks insured by the Federal Deposit Insurance Corporation" (Indictment, p. 2). Count One named eight overt acts committed in furtherance of the conspiracy, each of which was also charged as a substantive offense in later counts. Count One and all eight of these substantive counts were dismissed as to the three codefendants pursuant to their plea bargains. Defendant Pollard was convicted upon Count One and was acquitted upon Counts Two through Sixteen. Count Seventeen, of which the defendant was convicted, charged, in addition to certain jurisdictional allegations, that the defendant,

> "with intent to injure and defraud the said Bank, did wilfully misapply and cause to be misapplied monies, funds and credits of said Bank in that the defendants did cause Loan Number 11615 to be made by the Bank to John J. Schopp, in the amount of $50,000, the proceeds of which were deposited to the account of Ketteridge Industries, Inc., at said bank concealing the purpose for the loan and concealing the interest of H. CALLOWAY POLLARD, JR., NORMAN GRAHAM SMITH and MARSHALL STEWART, JR.; in violation of 18 U.S.C. §656; 2."

(Indictment, p. 15). Counts Eleven through Sixteen, of which the defendant was acquitted, and Counts Eighteen and Nineteen, of which he was convicted, are identical except for the name of the borrower and the date, number and amount of the loan.

At trial, the defendant sought, with respect to all the loan counts, including the three of which he was convicted, to disprove any intent to injure or defraud by offering evidence that each loan, regardless of whether it was ultimately repaid, was actually a benefit to the bank, rather than an injury, because it decreased the overall risks of the bank by replacing the obligation of a borrower whose credit worthiness the bank's own officers mistrusted with the obligations of solvent borrowers whose credit was superior, in the opinion of the same officers, all without actually advancing any additional funds. The Government called as a witness the bank officer who had made each of the loans in question, and defense counsel was permitted to ask, over the Government's objection, whether there had been, at the time the loan charged in Count Eleven was made, any foreseeability of loss therefrom and whether the loan benefited or injured the bank. The witness answered that the bank was much better off because the loan was made, and the defendant was acquitted as to that Count. When defense counsel attempted to repeat these questions as to a subsequent loan count, the trial judge sustained the Government's objection and plainly indicated that objections to similar questions would also be sustained, apparently because he believed both foreseeability of loss at the time and the net effect of the transaction standing alone were irrelevant as to intent. (Appendix to Briefs in the Court of Appeals, pp. A-155, A-164-167). Despite this ruling, however, the trial judge did admit, over defendant's objections, voluminous evidence to the effect that the loans had not been fully repaid.

In instructing the jury, the trial judge again declined to require that, in order to find any intent to injure or defraud the bank, it must have appeared *at the time* of the transaction that it would subject the bank to an unreasonable or foreseeable risk of loss. Instead, he defined

misapplication as any "unauthorized, unjustified or wrongful use" of the bank's monies and stated that,

> "it is only necessary that the defendant knew that the transactions somehow constituted a breach of bank laws or rules . . . ."

(Appendix to Briefs in Court of Appeals, p. A-287).

Because the trial judge had relied on the allegation of concealment to distinguish the defendant's authority that the indictment should have been dismissed, the theory of concealment became the focal point of the evidence and jury arguments by both the Government and defense counsel. The following instruction by the trial judge, however, presented the jury with four additional theories of guilt not even suggested by the indictment:

> "A misapplication may be accomplished by various means, such as the making of a loan which is insufficiently secured, or the making of a loan where the true recipient of the proceeds of the loan is concealed, or the making of a loan where the bank officer's or director's interest is concealed, or the making of a loan where there is no intention to repay or where the maker is insolvent. A misapplication may also occur where a loan is made on the strength of fraudulent applications or statements."

(Appendix to Briefs in Court of Appeals, p. A-286).

At the close of the Government's case and at the close of all the evidence, the defendant moved for judgment of acquittal, which was denied on both occasions. Upon the jury's verdict, judgment of conviction was entered and sentence imposed, and the defendant gave notice of appeal. The United States Court of Appeals for the Fourth Circuit affirmed on September 23, 1974 and denied rehearing on October 23, 1974.

REASON FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED TO PREVENT THE SUBVERSION OF THE FUNCTION OF THE GRAND JURY AND TO PROHIBIT THE TRANSFORMATION OF THE GRAND JURY'S SUBPOENA INTO A SECRET AND ILLEGAL ADMINISTRATIVE SUBPOENA IN THE HANDS OF THE FBI.

The procedure employed in this case by agents of the Federal Bureau of Investigation, and approved by the courts below, represents a frightening and effective mechanism for the destruction of individual privacy, one which should be condemned by this Court in the strongest terms available.

The procedure was as follows: agents of the FBI, for the purpose of commencing an investigation into the affairs of the North State Bank of Burlington, North Carolina, obtained from the office of the Clerk of District Court a series of grand jury subpoena forms signed by the Clerk in blank. The agents hen completed the forms directing each to the bank, requiring the production of specified documents, and providing that the subpoena could be "satisfied" by delivering the specified documents to the FBI. Because the bank sought to respect its duty of secrecy by delivering only the specified information, the FBI obtained a final subpoena, again providing for "satisfaction" by delivery to the FBI and calling for the following:

> "All records, ledgers, documents, and correspondence to include all related commercial and personal checking accounts concerning commercial loan transactions conducted with the North State Bank during the period from 1967 through 1972."

(Appendix to Briefs in Court of Appeals, p. A-21(a).)

The bank then submitted to a wholesale examination of all books, records and documents in its possession, abandoning its duty of secrecy under state law. See *Sparks v. Union Trust Company of Shelby*, 256 N.C. 478, 124 S.E. 2d 365 (1962). During the entire period described, the subpoenas so employed were never subjected to review by either the District Court or the United States Attorney; indeed, neither had even seen them at the time oral argument was heard in the Court of Appeals on the defendant's petition for mandamus. The defendant has no knowledge as to what information or which of the documents so obtained by the FBI were ever delivered to the grand jury or as to what disclosures or other uses the FBI has made or intends to make of such information or documents.

Rule 17 of the Federal Rules of Criminal Procedure authorizes the issuance of a subpoena, signed in blank by the clerk. The Rule also provides, however, that subpoenas are to be issued to "a party requesting it, who shall fill in the blanks before it is served." (Appendix B, p. 4b). The FBI, for whose use these subpoenas were issued, is in no sense a "party" and the provision that the subpoena may be satisfied goes beyond the authority conferred by the words "fill in the blanks". Clearly, the Rule contemplates that the grand jury subpoenas issued thereunder will be for the sole purpose of producing testimony and documents before a sitting grand jury.

The argument might readily be made that, because confidential information concerning his financial transactions constitutes property, the overbreadth of this last subpoena and the fact that it was used in support of an ongoing criminal investigation amounted to an unreasonable search and seizure in violation of the defendant's Fourth Amendment rights and, therefore, that the trial

judge's failure to exclude all evidence so obtained was reversible error. See generally, *In re September, 1971 Grand Jury,* 454 F.2d 580(7th Cir. 1971) *rev'd sub nom. United States v. Mara,* 410 U.S. 19 (1973); *In re Dionisio,* 442 F.2d 276 (7th Cir. 1971) *rev'd sub nom. United States v. Dionisio,* 410 U.S. 1 (1973); Note, *Government Access to Bank Records,* 83 YALE L. J. 1439, 1455-65, 1473 n. 162 (June, 1974). The status of confidential information in the hands of institutional third parties, as property protected under the Fourth Amendment, is a crucial question of constitutional law, and one not yet finally resolved. While this argument is not the reason advanced herein for the granting of the writ, it should be observed that, if the practice described above is permitted to continue, the FBI will be free, by avoiding judicial review as shown below, to violate whatever Fourth Amendment rights do attach to such informational property.

The argument which the defendant has asserted, even since before the grand jury was convened, is that the subpoenas so employed by the FBI constitute an abuse of the grand jury process, and are for that reason invalid, that the evidence obtained by their use should have been suppressed, and that the defendant has standing to raise this objection. The evil of these subpoenas is threefold. First, they wholly avoid judicial supervision and whatever restraints may be applicable to them. Second, they usurp to the FBI the grand jury's role as an independent, investigative body endowed with subpoena power. Third, they destroy the guarantee of secrecy which, except in judicially supervised instances, surrounds all the evidence produced pursuant to a grand jury subpoena.

With respect to the first objection, the defendant submits that he has standing to challenge these subpoenas

precisely because, if he has not, there will never be effective judicial review of their use. This principle, in an analogous form, was recently recognized by this Court in *United States v. Nixon*, —U.S.—, 41 L. Ed.2d 1039, 1054, 94 S.Ct. —, 42 U.S.L.W. 5237, 5240 (1974), citing with approval *Perlman v. United States*, 247 U.S. 7 (1918). Although arising in *Nixon* and *Perlman* as a question of timing, the applicable principle involved is that, if a subpoena issued at the instance of the government is improper, whether because it violates the defendant's privilege or for any other reason not adversely affecting the third party to whom it is directed, then the defendant must be granted standing to object or the abuse will always go unchecked. The principle operates with special force upon institutional third-party custodians of information. See generally, Note, *Government Acess to Bank Records, supra.* In the present case, the bank, intimidated by apparent authority and having inadequate incentive to resist, made no objection to these subpoenas, despite their obviously burdensome scope. Grand juries and the offices of United States Attorneys, if either has an incentive, which is doubtful, may never object to such subpoenas because there is no guarantee that information gained by their use, or even the fact of their issuance, will ever be revealed to them by the FBI, as they were not in this case until the defendant raised an objection. Thus, if these subjoenas constitute an abuse of the grand jury process which ought to be challenged, the defendant is the only party with incentive to do so.

The most compelling reason for which subpoenas such as these should be condemned is that, because there is no guarantee that the information and documents so obtained will ever be presented to the grand jury, there is also no guarantee that the same will be guarded by the oath of secrecy to which the grand jurors are sworn. Acting

with the apparent approval of the grand jury and the Court, although without supervision or direction by either, the FBI obtains by these subpoenas a license which few will question to demand from one person information concerning or the property of another and then to make whatever use of these it sees fit. These subpoenas contain no compulsion that the information or documents obtained be returned to the grand jury; indeed, under the procedure employed in this case, there need be no grand jury even sitting at the time. The FBI should not be permtited to convert by this practice the subpoena power of the grand jury into its own compulsory, administrative process. See *Durbin v. United States,* 221 F.2d 520, 522, (D.C. Cir. 1954); *United States v. Johns-Manville Corporation,* 213 F. Supp. 65 (E.D. Pa. 1962); *United States v. American Stevedores, Inc.,* 16 F.R.D. 164 (S.D.N.Y. 1954) (all of which condemn such conversion of grand jury subpoenas by the United States Attorney's office, but by which the Court of Appeals declined to be bound in this case).

The constitution and our comon law tradition recognize that, as the institutional conscience of the community, the grand jury ought to be empowered to pursue rumor and suspicion, and to enforce that pursuit by subpoena. The justification for this power is that when the grand jurors indict, the information so gained is made public subject to judicial control; but when they do not, when their collective conscience is not persuaded of probable cause, then the information relevant to the accusations or suspicions they reject is forever sealed by their oath of secrecy, and the accused is assured that, unless a subsequent grand jury is persuaded to indict, the information presented to the first will not be broadcast to his injury. No such public trust has been reposed in the FBI, nor has subpoena power been conferred upon it.

Defendant contends therefore, that the subpoenas employed in this case represent an illegal and dangerous practice which should be prohibited by the order of this Court. Because no case better suited to present the issue is likely to arise, the prayed for writ of *certiorari* should be granted to review this case.

2. THERE CURRENTLY EXISTS A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER WILLFUL MISAPPLICATION UNDER 18 U.S.C. §656 HAS CEASED, SINCE THE DECISION IN *United States v. Britton*, TO BE A GENERIC OFFENSE WHICH CANNOT BE SUFFICIENTLY CHARGED BY AN INDICTMENT USING THE STATUTORY LANGUAGE ALONE.

In *United States v. Britton*, 107 U.S. 655 (1883), this Court held that, because the words "willfully misapply" had no "settled technical meaning" and did not of themselves fully and clearly set forth every element of the offense, in an indictment charging misapplication,

> "It would *not be sufficient* simply to aver that the defendant 'willfully misapplied' the funds of the association . . . There must be averments to show how the misapplication was made, and that it was an unlawful one." (emphasis added)

107 U.S. 655, 669. The indictment in that case was held defective because it failed to aver a conversion of funds, which the Court considered an essential element of the offense. 107 U.S. 655, 666. Since 1883, this Court has never again construed the offense of willful misapplication nor in any way narrowed its holding in *Britton*. Nonetheless, in response to the defendant's motion to dismiss this indictment, which likewise fails to allege conversion or to show why the transactions involved were unlawful, the District Court concluded that the term "willfully misappli-

ed" has now gained a technical meaning and so held this indictment, and others simultaneously being reviewed,

> "*sufficient* because they follow the language of the statute in charging a crime. The prevailing view today apears to be that it is sufficient to set out an offense under 18 U.S.C. §656 (for misapplication) by using the language of the statute, and the omission of detailing the means by which the offense was committed does not make the indictment insufficient." (emphasis added, footnote omitted)

(Appendix A, p. 9a).

Since the decision in *Britton*, the Courts of Appeal for the Second and Ninth Circuits have held that the words "willfully misapply" have evolved a sufficiently technical meaning to permit the offense to be charged in the statutory language alone. See *United States v. Fortunato*, 402 F.2d 79, 81 (2nd Cir.) *cert. denied* 394 U.S. 933 (1969); *Hargreaves v. United States*, 75 F.2d 68 (9th Cir.) *cert. denied* 295 U.S. 759 (1935). The same conclusion has been suggested in dictum by the Second, Fifth and Tenth Circuits. See *United States v. Moraites*, 456 F.2d 435, 441 (3rd Cir.) *cert. denied* 409 U.S. 819 (1972); *United States v. Archambault*, 441 F.2d 281, 283 (9th Cir.), *cert. denied* 404 U.S. 843 (1971); *United States v. Bearden*, 423 F.2d 805, 810-811 (5th Cir.) *cert. denied* 400 U.S. 836 (1970).

Recently rejecting this view, however, the First and Seventh Circuits have both required the additional averments mandated by *Britton*. See *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974); *United States v. Quinn*, 365 F.2d 256 (7th Cir. 1966). Prior to the decision below, it was clear that the Fourth Circuit too regarded *Britton* as controlling. *Johnson v. United States*, 95 F.2d

813 (4th Cir. 1938). Although *Johnson* was squarely in point, the Fourth Circuit, for reasons which cannot be ascertained from its per curiam opinion, upheld the District Court's refusal to dismiss the indictment. The confusion is enhanced by the fact that *Gens*, decided after the District Court's denial of the motion to dismiss was reported, nonetheless recognized *Johnson* as being the law of the Fourth Circuit, even though the District Court's denial is, both in language and effect, utterly inconsistent with *Johnson*.

Since the decision in *Britton*, the adoption of Rule 7(c) of the Federal Rules of Criminal Procedure has greatly reduced the specificity required of indictments generally. However, this Court recognized, in *Russell v. United States*, 369 U.S. 749, 762, 765 (1962), that the sufficiency of any indictment charging an offense in statutory language must be measured against the Sixth Amendment's requirement that the defendant be adequately apprised of the nature of the accusation he must be prepared to meet. (Appendix B, p. 1b). To meet this requirement, the Court in *Russell* held that, where the statute creating an offense contains "generic terms", an indictment must descend to particulars rather than charging the offense in the same generic terms. 369 U.S. 749, 762, 765. For exactly the same reason, the Court in *Britton* held that an indictment for misapplication is not sufficient unless it contains adidtional averments to "show how the misapplication was made, and that it was an unlawful one." Clearly, to make such a showing, the indictment must not only identify the transaction involved, but must also demonstrate or allege that each of the elements of the offense in fact occurred. The defendant contends that the indictment in the present case was defective for failure to make such a showing, both because it omits an allegation of conversion and because neither the statutory

language nor the particulars alleged could apprise him of the nature of the charge he must meet while there persists, as will be shown below, a conflict among the circuits as to the elements of the offense itself.

The defendant respectfully submits, therefore, that the writ should be granted because the time has now come for the Supreme Court either to reaffirm its holding in *Britton* or to approve the view that *Britton* is no longer the law.

3. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW CREATES A DIRECT CONFLICT AMONG THE CIRCUITS AS TO THE ELEMENTS WHICH CONSTITUTE THE OFFENSE OF MISAPPLICATION AND EXPANDS THAT OFFENSE FAR BEYOND THE INTENT OF CONGRESS.

The offense of misapplication was apparently intended as a catchall. It is all the more important, therefore, unless *Britton* is specifically reaffirmed, to resolve the present conflict among the circuits as to the elements of the offense.

At the trial of this case, the defendant requested instructions to the jury which incorporated the view of the First and Second circuits that, for a transaction to be a misapplication, it must be obviously improper and unjustifiable and must subject the bank to a risk of probable and foreseeable loss. See *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974); *United States v. Giordano*, 489 F.2d 327 (2nd Cir. 1973); *United States v. Docherty*, 468 F.2d 989 (2nd Cir. 1972); *United States v. Mulloney*, 79 F.2d 566 (1st Cir. 1935). The trial judge never gave the requested instructions and that failure, assigned as error on appeal, was approved by the Fourth Circuit's per curiam affirmance.

The instructions which the trial judge gave instead made virtually every use of bank funds which violates any

state or federal bank rule or regulation a felonious misapplication under 18 U.S.C. §656. (See pp. 6, 7 *supra*). These instructions are in plain conflict with the First and Second Circuit cases cited above, the thrust of which is that, unless the natural and probable consequence of a given transaction is to cause a loss, the transaction itself affords no basis for inferring the intent to injure or defraud required in order to render it a misapplication. Clearly, there could be technical violations which, although prohibited, entail no such natural or probable consequence, do not reflect an intent to injure or defraud and were not, therefore, intended to be punished as felonies under 18 U.S.C. §656. If this conclusion is false, the Supreme Court should bring that fact to light and so give warning to the thousands of honest bank officers and directors who reasonably believe that, while a good faith attempt to meet exigent circumstances with exceptions to established policy may prove an error of judgment, it will not give rise to criminal liability unless a criminal statute expressly so provides.

Moreover, in the three substantive counts of which the defendant was convicted, the specific regulation violated by those loans, if any, was never identified by the indictments or the United States Attorney. Even the trial judge's instructions to the jury failed to identify any particular law or regulation allegedly violated by those loans. This sequence of events has an important implication for the future, if the present indictment is upheld, because one must then conclude: (a) that, where an indictment describes an apparently legitimate transaction but also alleges intent to defraud and concealment, a defendant may be required to stand trial for misapplication without first identifying the violation which made the transaction illegal; or (b) that, although a transaction in fact violates no banking law or regulation and has no natural or foresee-

able tendency to injure the bank, indeed, even if it benefits the bank, it will yet constitute a felonious misapplication if the jury infers an intent to injure or defraud from the fact of "concealment" alone. The first conclusion involves a patent denial of constitutional rights under the Fifth and Sixth Amendments. The second conclusion would render the offense impossible to disprove, if the transaction occurred at all. This is so because concealment requires no overt act; it is itself a matter of intent. Moreover, in the present case, the Government's evidence affirmatively showed that there was no concealment. More importantly, however, the second conclusion also extends the offense to include acts which this Court has heretofore held, in *United States v. Britton,* 107 U.S. 655, 668 (1883), give rise to civil, rather than criminal, liability as mere acts of maladministration.

After almost one hundred years, the Courts of Appeal have still reached no consensus as to the precise meaning of the term "misapply". If this reflects the fact that one cannot say what misapplication is, the time has come for the Supreme Court to say what it is not. It is not, as the trial judge should have instructed the jury upon request, a transaction which was not expressly prohibited by any banking law or regulation and was, as it appeared to the parties at the time, beneficial rather than harmful to the bank. It is no answer to say that a transaction which appears to be benecial or from which no loss actually results may yet be a misapplication if effected with an intent to injure or defraud because, if the offense of misapplication is not to be limitless, there must at least be objective criteria to be satisfied before a jury will be permitted to infer the specific criminal intent. If no such criteria can be articulated, the offense of misapplication under 18 U.S.C. §656 is void for vagueness.

In recent years reports of decisions involving substantive questions with respect to the offense of misapplication have appeared with increasing frequency. These decisions, it may be surmised, reflect both the economic climate of our times and the spiraling number and complexity of state and federal regulations affecting banks. Under these circumstances, and because the lower courts have failed to develop one, the need has grown urgent for a definitive statement of the elements of the offense. The petitioner submits that the writ should be granted to provide such a statement.

4. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE POLICY OF GRAND JURY SECRECY AND AN INDIVIDUAL'S RIGHT TO BE TRIED ONLY UPON THE INDICTMENT OF THE GRAND JURY.

The doctrine is well settled that the deliberations of a grand jury and testimony before it, will ordinarily be kept secret although exceptions may be made, in the discretion of the trial judge, under the power conferred by Rule 6(e) of the Federal Rules of Criminal Procedure. See *Dennis v. United States,* 384 U.S. 855, 869-70 (1966). In direct conflict with this general policy is the fact that, unless a defendant has access to records of the testimony before and the deliberations of the grand jurors, his right under the Fifth and Sixth Amendments to be tried only upon the theory of guilt contained in their indictment may be rendered nugatory. See, *Russell v. United States,* 369 U.S. 749, 770 (1962); *Stirone v. United States,* 361 U.S. 212, 217 (1960). The fact of this conflict and its prejudicial impact on a defendant, are clearly revealed in the case at bar, which presents, therefore, an appropriate occasion for its resolution by this Court.

Under Rule 7(c) of the Federal Rules of Criminal Procedure, the indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged." (Appendix B, p. 3b). In the present case, the Court of Appeals has held, in effect, that such a statement may be sufficient in law to withstand a motion to dismiss, but still be so broadly worded as to permit the trial judge to instruct the jury on four theories of guilt not even suggested by the indictment on its face. This holding is in direct conflict with the rule of other circuits that, since the court and the prosecutor must not be allowed to guess what was in the minds of the grand jurors at the time they returned the indictment, only theories apparent on the face of the indictment may be presented to the petit jury. See, *Russell v. United States*, 369 U.S. 749, 770 (1962); *United States v. Bryan*, 483 F.2d 88, 96-97 (3rd Cir. 1972); *United States v. Beard*, 436 F.2d 1084, 1087 (5th Cir. 1971), *United States v. Silverman*, 430 F.2d 106, 111 (2nd Cir. 1970).

If the rule of the Second, Third and Fifth Circuits is an accurate expression of the law, the decision of the Court below should be reversed. Necessarily, however, such a rule would significantly restrict the notice pleading sought by Rule 7(c), especially as to catchall offenses such as misapplication. If the rule of these Circuits is not the law, then some restriction must be placed upon a trial judge's discretion under Rule 6(e); otherwise, the right proclaimed by *Stirone* and *Russell* may not survive at all, as the defendant's trial well demonstrates. The defendant's motion to record the grand jury proceedings was denied, despite his offer to bear the expense thereof, as was his motion to discover any records or documents of those proceedings. Moreover, even if the grand jurors did voluntarily keep any such records, which is not known, the de-

fendant has no assurance that they would be sufficiently complete to prove or disprove that the four additional theories introduced by the judge's instructions to the jury had in fact been considered by the grand jurors, much less included in the indictment itself.

Of course, the conflict between these policies can normally be avoided if the trial judge will, in his discretion, order some records to be kept of grand jury proceedings and, when the need arises, grant a motion for a bill of particulars or discovery of these records. A defendant's constitutional rights, however, must not be made dependent upon the unfettered discretion of the judge. In the present case, the judge rejected out of hand every attempt by the defendant to discover the nature of the charge against him and, until the eve of trial, even denied him access by discovery against the bank to the same records which the FBI had obtained pursuant to its secret subpoena. Such a clear abuse of discretion makes this an appropriate case for this Court to review for the purpose of determining whether and how that discretion should be restricted.

Three alternatives are available for the resolution of the conflict herein raised: first, to require universal recordation of grand jury proceedings or, at least, to make recordation upon motion a matter of right, which motion shall be prerequisite to any claim that the requirements of *Russell* and *Stirone* have not been met; second, to require, as to any indictment charging an offense the statute creating which does not fully and clearly set forth all its elements, a greater degree of specificity than presently required under Rule 7(c); and, third, to restrict the discretion of a trial judge in denying bills of particulars and discovery of grand jury records, perhaps making at least one a matter of right, the choice as to which being left in each case to the judge. Whichever alternative is chosen, the

effect upon criminal procedure in state and federal courts would be profound and should, therefore, be uniform as well. The need for such a choice, by this Court, is clear, and no case will be better suited to raise and decide the issue than is the case at bar. The petitioner would respectfully submit, therefore, that the writ of *certiorari* should be granted.

CONCLUSION

The case at bar raises two types of issues which, the petitioner believes, require review by this court. The issues raised herein involving the substantive law of misapplication of bank funds under 18 U.S.C. §656 are ripe for review by this Court because the Courts of Appeal have failed to agree both as to the elements of the offense and as to whether those elements are so well known as to permit the offense to be charged in statutory language. If the requirements of due process are to be preserved for future defendants, it will be necessary for this Court either to define the offense or to declare it void. The two other issues raised herein require the exercise by the Court of its supervisory control over our judicial system. The discretion accorded trial judges under Rule 6(e) and the generality permitted in indictments under Rule 7(c) have been seen to thwart individual constitutional rights under the Sixth Amendment. There is needed an accommodation, either by restricting that discretion or by requiring more specifically worded indictments. The use by the FBI of grand jury subpoenas is a dangerous and important usurpation of the grand jury's function. If the writ were granted, the decision of this Court could prohibit and even prevent the recurrence of this abuse.

It is, therefore, respectfully submitted that this peti-

tion for writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit should be granted.

JACK W. FLOYD
ERIC P. HANDLER
Attorneys for Petitioner,
H. Calloway Pollard

OF COUNSEL:

SMITH, MOORE, SMITH, SCHELL & HUNTER
700 Jefferson Building
Post Office Drawer G
Greensboro, North Carolina 27402
Telephone: (919) 273-8263

APPENDIX A—OPINIONS AND ORDERS BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1368

UNITED STATES OF AMERICA, *Appellee,*

versus

H. CALLOWAY POLLARD, JR., *Appellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Argued September 4, 1974 Decided September 23, 1974

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

Jack W. Floyd (Eric P. Handler and Smith, Moore, Smith, Schell and Hunter on brief) for Appellant; N. Carlton Tilley, Jr., United States Attorney, (Hugh P. Mabe, III, Attorney, Criminal Division, United States Department of Justice, on brief) for Appellee.

PER CURIAM:

H. Calloway Pollard, Jr., was convicted by a jury of three counts of willful misapplication of bank funds in violation of 18 U.S.C. §656 and one count of conspiracy willfully to misapply bank funds and to defraud the United States in violation of 18 U.S.C. §371.

Upon consideration of the record, briefs and oral argument, we find no reversible error.

AFFIRMED.

Filed Oct. 23, 1974, William K. Slate, II, Clerk

United States Court of Appeals for the Fourth Circuit

No. 74-1368

United States of America, *Appellee,*

versus

H. Calloway Pollard, Jr., *Appellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

Upon consideration of the petition for rehearing with the request for rehearing en banc in the above entitled case, and with the concurrence of Judges Russell and Widener, no member of the court having requested a poll,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, denied.

FOR THE COURT:

a/CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

A True Copy, Teste:

WILLIAM K. SLATE, II, *Clerk*
By FAYE CHLONIE,
Deputy Clerk

Filed Oct. 25, 1974, William K. Slate, II, Clerk

United States Court of Appeals for the Fourth Circuit

No. 74-1368

United States of America, *Appellee,*

versus

H. Calloway Pollard, Jr., *Appellant.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
Hiram H. Ward, District Judge.

Upon motion of the appellant, by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court to and including Friday, November 22, 1974.

For the Court—by Direction.
/s/ WILLIAM K. SLATE, II, *Clerk*

A True Copy, Teste:
WILLIAM K. SLATE, II, *Clerk*
By FRANCES S. SEWELL,
Deputy Clerk

Filed Oct. 12, 1973, Carmon J. Stuart, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR

THE MIDDLE DISTRCT OF NORTH CAROLINA

GREENSBORO DIVISION

UNITED STATES OF AMERICA

v. Cr-279-G-73

JOHN ROBERT KERNODLE
NORMAN GRAHAM SMITH

UNITED STATES OF AMERICA

v. Cr-280-G-73

JOHN ROBERT KERNODLE
H. CALLOWAY POLLARD, JR.
MARSHALL STEWART, JR.

UNITED STATES OF AMERICA

v. Cr-281-G-73

HOUSTON P. SHARPE
NORMAN GRAHAM SMITH
CHARLES M. MCMILLAN

MEMORANDUM ORDER

WARD, District Judge

The three above-entitled cases charge various officers and directors of the North State Bank of Burlington, North Carolina, and defendant McMillan with willfully misapplying bank monies, funds, and credits. Each indictment charges defendants in Count One of their respective

indictments with conspiracy. The remaining counts charge a violation of 18 U.S.C. §656 and 18 U.S.C. §2. In addition, the indictment in Cr-281-G-73 charges those defendants with making a false financial statement in violation of 18 U.S.C. §1014. All defendants are charged in each count of their respective indictments.

Prior to arraignment on October 5, 1973, these defendants filed various motions attacking the indictments and requesting severance. The Court initially denied those motions for reasons as set out in this memorandum order.

Due to the similarity of some of the contentions raised in these three cases, the Court has decided to deal with all of the motions in this order. Generally, all defendants attack the sufficiency of both the conspiracy and substantive counts of the indictments. They also challenge the grand jury proceedings which issued the indictments. Some defendants have also moved for a severance.

I

Sufficiency of the Indictment Relating to the Counts Charging a Violation of 18 U.S.C. §656

Each of the indictments charges the defendants with violation of 18 U.S.C. §656 in that they allegedly willfully misapplied bank funds. In Cr-279-G-73 Counts Two through Eleven contain those charges.[1]

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[1]Count Two charges, in material part, the defendants "with intent to injure and defraud the said Bank, did wilfully misapply and cause to be misapplied monies, funds, and credits of said Bank in that the defendants did cause Loan Number 9252 to be made by the Bank to Barbara T. Smith, in the amount of $40,000.00, the proceeds of which were deposited in the account of the defendants, concealing the purpose for the loan and concealing the interests of JOHN ROBERT KERNODLE and NORMAN GRAHAM SMITH in the loan, which loan was financially unsound; in violation of 18 U.S.C. 656; 2."

The remaining counts allege the same type of transaction with only the date, loan number, amount and recipient being different.

In Cr-280-G-73, Counts Two through Nineteen allege violation of 18 U.S.C. §656. Counts Two through Ten of that indictment charge defendants with causing checks to be paid from an insufficient funds account.[2] Counts Eleven through Nineteen allege a misapplication by the making of loans.[3] In Cr-281-G-73 the allegations as to 18 U.S.C. §656 appear in Counts Two through Twenty-Four. Counts Two through Twenty-One charge a misapplication by writing checks on an insufficient funds account, using the same format as Counts Two through Ten in Cr-280-G-73 as set out in footnote 2. Counts Twenty-Two through Twenty-Four of Cr-281-G-73 charge misapplications by the making of loans, using the format of Counts Eleven through Nineteen in Cr-280-G-73 as set out in footnote 3.

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[2]Count Two charges, in material part, the defendants "with intent to injure and defraud the said Bank, did wilfully misapply and cause to be misapplied the sum of $21,525.65 of the monies of the said Bank, in that the defendants did cause to be paid out of the monies and funds of the said Bank a check in the amount of $21,525.65, dated December 23, 1970, drawn on the account of Ketteridge Industries, Inc., which, as the defendants well knew, did not contain sufficient funds to cover the said check, whereby the possession, control, and use of said monies and funds of the Bank were converted and misapplied to the use and benefit of Ketteridge Industries, Inc., NORMAN GRAHAM SMITH, H. CALLOWAY POLLARD, JR., and MARSHALL STEWART, JR.: in violation of 18 U.S.C. 656; 2."

The remaining counts are the same except for dates and amounts.

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[3]Count Eleven charges, in material part, the defendants "with intent to injure and defraud the said Bank did wilfully misapply and cause to be misapplied monies, funds, and credits of said Bank in that the defendants did cause Loan Number 10012 to be made by the Bank to Ketteridge Industries, Inc., in the amount of $260,000.00, the proceeds of which were deposited in said Bank to the account of Ketteridge Industries, Inc., concealing the purpose for the loan and concealing the interest of H. CALLOWAY POLLARD, JR., NORMAN GRAHAM SMITH and MARSHALL STEWART, JR.; in violation of 18 U.S.C. 656; 2."

The remaining counts are the same except for different dates, loan numbers, amounts, and recipients.

Defendants contend that the counts charging a misapplication of bank monies, funds, or credits do not conform to the requirements of Rule 7(c), Federal Rules of Criminal Procedure. As to the counts alleging misapplication through the payment of checks drawn on insufficient funds accounts, they claim that the indictment fails to show that the company on whose account the checks were drawn was insolvent and thus unable to repay the bank. They state that the company may have given security or had some arrangement with the bank for repaying the checks. They state that the indictment must show that the company did not have other accounts in the bank which contained funds. They also say that regulations contained in 12 C.F.R. §7.1161 permits banks to extend credit through use of overdrafts. In regard to the misapplication charges through use of loans, they claim that the indictment must allege that the loans would and could not be repaid. They say that the defendants' interest and purpose in the loans must be more specifically stated and the indictment must detail the defendants' involvement in making the loans. They state that the contention of the indictments that they concealed their purpose and interest in the loans does not cure the defect of insufficiency. To summarize, the defendants claim that in an indictment charging misapplication under 18 U.S.C. §656, the government must detail the facts behind the charge, give particulars as to the involvement of the defendants and explain why the transaction was illegal. They claim that the three indictments merely allege garden variety banking transactions and that the charges that defendants acted with intent to defraud, to conceal their interests, or to convert bank funds and monies merely states a conclusion but does not inform them of the nature of the charges against them.

In support of their contentions, defendants rely upon *United States v. Britton,* 107 U.S. 655, 2 S.Ct. 512, 27

L.Ed. 520 (1883), for the proposition that the term 'willfully misapplied' has no set meaning and, therefore, the indictments must particularize the means whereby the alleged misapplications were accomplished in order to sufficiently inform them of the charges which they face. In addition, they place heavy reliance upon *Johnson v. United States*, 95 F.2d 813 (4th Cir. 1938), for their contention that an indictment under 18 U.S.C. §656 must negate any possibility that the banking transaction might be legitimate or that the monies taken or paid out might be repaid at a future date.

In *Johnson v. United States, supra*, the court held that an indictment under what is now 18 U.S.C. §656 did not charge an offense. The indictment charged in the language of the statute and then went on to explain defendant's actions in detail. The indictment charged that defendant took a note from another individual, discounted it, and credited the funds to his personal checking account which had been overdrawn. The court noted that allegations failed to show a fraud on the bank,[4] or a conversion of bank funds, since the funds were never withdrawn. In effect, the court found that the allegations particularizing the crime merely recounted routine banking transactions.

The Court finds significant differences between the indictments here and those in *Johnson v. United States, supra*. Here, the counts as to checks drawn on insufficient

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[4]As summarized in *United States v. Docherty*, 468 F.2d 989, 994 (2nd Cir. 1972):

> . . . On the other hand, Johnson v. United States, 95 F. 2d 813 (4 Cir. 1938) (Soper, J.), held that no crime was charged when the indictment alleged only that a bank president, whose conduct was characterized with a copious array of pejorative adverbs, had discounted a note payable to himself and applied the proceeds to his own account, in order to meet an overdraft. The court found the indictment flawed since there was no allegation that the maker was known to be insolvent or to have an intention not to pay.

funds accounts in adition claim that the funds were converted. In *Johnson* there was no claim that the note was bad or that the defendant converted the funds. In the present indictments the counts relating to the loans also claim that the defendants concealed the purpose of the loans and their interests in them. In *Johnson* there was no concealment, and in fact there the defendant was quite candid about what he did. The Court also finds significant that here the indictments charge many different misapplications involving large sums of money, whereas in *Johnson*, the alleged misapplication occurred once, and only involved $600.[5] The Court finds that the present indictments sufficiently inform defendants of how the alleged misapplication took place and indicate why it was unlawful. The Court cannot read these indictments and come to the conclusion that only an ordinary banking transaction is charged. These indictments allege conversion and concealment as essential ingredients of the transactions.

While the Court holds that the present indictments sufficiently explain the means whereby the misapplications arose, it also holds that [sic] indictments sufficient because they follow the language of the statute in charging a crime.[6]

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[5]In *United States v. Moraites, infra,* 456 F.2d 435, the court said it need not consider whether an indictment charging an offense under 18 U.S.C. §656 and framed in the language of the statute would be sufficient standing alone, since in that case the first count of the indictment charged an elaborate conspiracy to misapply bank funds, and all defendants were charged in both the conspiracy and the challenged substantive counts. The same could be said of the three indictments in the present case. In fact, it appears that the indictments in the present case are more informative than those in *United States v. Moraites, supra,* at 440 n. 7, which the court held sufficient.

[6]The essential elements of 18 U.S.C. §656 in this case are (1) the accused was an officer, director, etc., of a bank; (2) the bank had a particular type of federal connection; (3) the accused willfully misapplied money, etc., of said bank; and (4) the accused acted with intent to injure or defraud the bank.

The prevailing view today appears to be that it is sufficient to set out an offense under 18 U.S.C. §656 (for misapplication) by using the language of the statute, and the omission of detailing the means by which the offense was committed does not make the indictment insufficient. *United States v. Archambault*, 441 F.2d 281, 283 (10th Cir. 1971), *cert. denied*, 404 U.S. 843 (1971); *United States v. Bearden*, 423 F.2d 805, 810-11 (5th Cir. 1970), *cert. denied*, 400 U.S. 836 (1970); *United States v. Fortunato*, 402 F.2d 79, 81-2 (2nd Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); and see also *United States v. Moraites*, 456 F.2d 435, 440-41 (3rd Cir. 1972), *cert. denied*. Those cases either implicitly or explicity hold that the term 'willfully misapplied' as used in 18 U.S.C. §656 is not so vague and indefinite a word so as to necessitate further explanation. (See *United States v. Moraites, supra*, at 441 n. 9 for citation of authorities that this term as used in 18 U.S.C. §656 has gained a technical meaning since the decision in *United States v. Britton, supra*, which was decided in 1883.)

Since the decisions in *Britton* (1883) and *Johnson* (1938), Congress has adopted new rules of criminal procedure to replace the old common law rules of pleading. Rule 7(c), Federal Rules of Criminal Procedure, became effective in 1946. As stated in Wright, Federal Practice and Procedure, Vol. 1, §123 at 219-21 (1969):

> Rule 7(c) put an end to "the rules of technical and formalized pleading which had characterized an earlier era." The complex requirements of common law criminal pleading and of some state practices are now obsolete. The precision and detail formerly demanded are no longer required, imperfections of form that are not prejudicial are disregarded, and common sense and reason prevail over technicalities.

> The fundamental functions and requirements of an indictment have not been modified, and it is still essential that every element of an offense be stated and that the defendant be given fair notice of the charge against him, but the rule now permits a plain, concise, and definite statement of the essential facts constituting the offense.

The sagacity of Rule 7(c) readily appears in the instant case. An indictment charging a violation of 18 U.S.C. §656 may indeed involve complex matters of banking law and policy at the trial. To do as defendants suggest and require that all the details of the alleged illegal transaction be explained in detail would result in a reversion to the common law technical form of pleading. To avoid this result, the government necessarily must rely upon conclusory statements, the facts of which must be proved during the trial. The Court holds that the term 'willfully misapplied' through the years has acquired a specific meaning so as to enable the defendants to be put on notice of the crime for which they are charged and to enable them to prepare their defense.[7] In addition, these three indict-

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[7]A misapplication is an unauthorized, unjustifiable, or wrongful use of the bank's monies, funds, or credits. However, the term 'willful misapplication' as used in 18 U.S.C. §656 means a criminal misapplication rather than a mere act of maladministration. In order for there to be a willful misapplication, the defendant must convert to his own use, benefit, or gain, or to some other person's or company's use, benefit, or gain, the monies, funds, or credits of the bank. However, it is not every such unauthorized or unlawful appropriation of monies, funds, or credits which is punishable, but only those acts willfully done with the specific intent to defraud or deceive the bank. *See United States v. Moraites, supra,* at 441 and cases cited in footnote 9, and *United States v. Docherty, supra,* 468 F.2d 989 (2nd Cir. 1972). The fact that the bank may suffer no loss or injury, or that there is a future possibility of repayment or benefit to the bank is no defense. The offense is complete immediately upon the act of willful misapplication with intent to defraud or deceive. *United States v. Acree,* 466 F. 2d 1114 (10th Cir. 1972).

ments sufficiently explain the transactions to defendants so as to comply with Rule 7(c).

In regard to defendants' contentions that the transactions alleged in the indictments can be shown to be legal, it is enough to say that they will have ample opportunity to present their evidence at the trial. To require the government to negate every possible or unusual defense contravenes the purpose of Rule 7(c) and would lead to a mini-trial prior to arraignment in order to determine whether a particular transaction could or might be merely irregular rather than illegal. Such a procedure is neither good policy, nor is it the law. As stated in *United States v. Thomas,* 444 F.2d 919, 926 n. 23 (D.C. Cir. 1971):

> As a general rule, it is not required that matters of defense be negated in an indictment or information. Evans v. United States, 153 U.S. 584, 590, 14 S.Ct. 934, 38 L.Ed. 830 (1894); Fippin v. United States, 162 F. 2d 128, 131 (9th Cir. 1947); United States v. Branigan, 299 F. Supp. 225, 228 (S.D.N.Y. 1969). *See generally* 1 C. Wright, Federal Practice and Procedure §125 (1969).

See also *United States v. Vannatta,* 189 F. Supp. 939, 941 (D. Hawaii 1960), which applied the general rule to a case involving 18 U.S.C. §656.

* * *

[The remaining sections of the Memorandum Order deal with issues not pertinent to this petition and are, therefore, omitted.]

* * *

IT IS THEREFORE, ORDERED that each defendant's motion as to each and every particular be, and the same hereby is, denied. The motion for severance is denied without prejudice to its being raised again after defendants

have completed their discovery, and in such time in advance of trial to permit the Court to give adequate consideration to it.

s/ HIRAM H. WARD
United States District Judge

A True Copy, Teste:
CARMON J. STUART, *Clerk*
By WAYNE N. EVERHART,
Deputy Clerk

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, amend. V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C., §656:

> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Re-

serve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. June 25, 1948, c.645, 62 Stat. 729."

Rule 6(e), Federal Rules of Criminal Procedure:

"SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a

judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Rule 7(c), Federal Rules of Criminal Procedure:

"(c) Nature and contents

(1) In general. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Criminal forfeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) Harmless error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Rule 17(a), (c), Federal Rules of Criminal Procedure:

Rule 17. Subpoena.

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

(c) FOR PRODUCTION OF DOCUMENTARY EVIDENCE AND OF OBJECTS. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-619

H. CALLOWAY POLLARD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. A, p. 1a) is unreported. The opinion of the district court (Pet. App. A, pp. 4a-13a) is reported at 367 F. Supp. 844.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1974, and a petition for rehearing

was denied on October 23, 1974 (Pet. App. A, p. 2a). The petition for a writ of certiorari was filed on November 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging willful misapplication of bank funds must state that the accused converted the funds to his own use.

2. Whether the court must charge the jury that in order to convict petitioner of willful misapplication of bank funds, it must find that the bank was subjected to a risk of foreseeable loss.

3. Whether petitioner can challenge the procedure by which a bank, responding to a subpoena, turned over to a government agent records of corporations petitioner controlled.

4. Whether the failure of the court to order the recording of the grand jury deliberations violated petitioner's constitutional rights.

STATEMENT

A nineteen-count indictment filed in the United States District Court for the Middle District of North Carolina charged petitioner with conspiracy willfully to misapply bank funds (count 1) and with misapplication of the funds (counts 2 to 19), in violation of 18 U.S.C. 371 and 656. Following a jury trial petitioner was convicted on the conspiracy count and three of the substantive charges (counts 17 to

19). He was sentenced to a term of two years' imprisonment on count 1, and to concurrent terms of one year's imprisonment on counts 17 to 19, to run consecutively to the sentence on count 1. The court of appeals affirmed (Pet. App. A, p. 1a).

1. During the period covered by the indictment—January 1970 to June 1972—petitioner was a director of the North State Bank, Burlington, North Carolina. He was also a director, major shareholder, and officer of Ketteridge Industries, Inc., a failing men's clothing franchiser. In addition, petitioner controlled several other businesses, including two real estate companies, Burlington Real Estate and Home Builders of Alamance, Inc. (Tr. 83-84, 121-122, 135-136, 140).[1] Each of the corporations with which petitioner was associated maintained accounts with the North State Bank.

Petitioner was not involved in the daily affairs of the bank. Co-defendant Norman Graham Smith (who served as president and director of the North State Bank), co-defendant Marshall Stewart, and petitioner comprised the directorship of Ketteridge Industries (Tr. 122).

From mid-1970 until its doors were padlocked in 1972, Ketteridge experienced financial difficulties. The records of the North State Bank reflected numerous entries for Ketteridge in the bank's "insufficient" files, *i.e.*, computerized daily printouts of in-

[1] We are lodging with the Clerk of this Court the six-volume transcript of trial ("Tr.").

formation regarding checks presented for payment against insufficient funds (Tr. 87). Under the Uniform Commercial Code 4-301 (official ed. 1958), checks held by a bank beyond midnight of the next business day can not be returned through regular channels and become the responsibility of the holder. Such collectible checks against insufficient funds were recorded by the North State Bank in a "cash item" ledger. Although it violated bank policy to retain overdrawn checks, North State Bank's cash item ledger contained numerous entries for checks written by Ketteridge in substantial amounts (Govt. Exh. 5, 6; Tr. 91-92, 117-119, 488-495, 502-524). One survey, covering 63 banking days in January through March 1971, showed that Ketteridge's account was overdrawn daily by an average of more than $33,000 (Tr. 524).

2. On August 5, 1970, Max Sharpe, North State Bank's senior loan officer, discovered that Ketteridge's accounts were $388,000 in arrears, consisting of $178,000 from 22 check overdrafts, $130,000 in loans, and $80,000 on a franchise account. This amount far exceeded the $168,000 lending limit for any one client imposed upon the bank by Federal Deposit Insurance Corporation regulations (Tr. 117-126). Sharpe reported this situation to John Houser, the executive vice-president of the bank, and together they consulted co-defendant John Kernodle, North State Bank's chairman of the board (Tr. 127).

The following day, petitioner and Kernodle discussed the deficit at the bank and telephoned Smith for advice (Tr. 132, 133). At Smith's direction, the

bank executed a loan of $260,000 directly to Ketteridge Industries, and of $50,375 each to Home Builders and to Marshall Stewart, the president of Ketteridge; the loans to Stewart and Home Builders were unsecured. The proceeds of all three loans immediately were deposited in the Ketteridge account to offset its arrearages (Tr. 133-137). In order to comply with the $168,000 federal limit, North State Bank discounted $100,000 of the Ketteridge loan with a Virginia bank (Tr. 134-135). Although the loan transactions (but not the deposits of the proceeds) were reported on the loan audit list, which usually was reviewed by the board of directors of the bank at its monthly meeting, there was no discussion at any meeting by petitioner or any other party relating to the borrowing by Home Builders or Stewart for the benefit of Ketteridge (Tr. 143-144, 353, 401).

Thereafter, petitioner and others continued to make unsecured loans to satisfy Ketteridge overdrafts. On August 31, 1970, petitioner obtained $30,000 from the North State Bank for Ketteridge, executing a note on behalf of Burlington Real Estate (Tr. 140). On February 1, 1971, Stewart borrowed an additional $50,000 and immediately deposited it in the Ketteridge bank account to cover a portion of $64,000 in Ketteridge overdrafts (Tr. 148, 490). The latter loan was ordered by Smith, although bank employees knew that Stewart would be unable to repay it personally (Tr. 149-150). By February 12, 1971, the Ketteridge imbalance stood at $96,000. Smith's wife was issued a $50,000 unsecured loan, with the

bulk of the money deposited in the Ketteridge account (Tr. 145, 491-492).

3. On May 12, 1971, the Ketteridge account had an insufficient fund balance of $63,515.26 (Tr. 492). During that month, petitioner and Smith approached John J. Schopp, a shareholder in Ketteridge, and requested that he negotiate a loan to aid Ketteridge. Petitioner told Schopp that certain stockholders wanted to sell their shares; that petitioner, Smith, and Stewart intended to purchase the shares; and that during the "transition period" some capital was needed to "help them hold the line" (Tr. 325-327). Believing that he was to receive debentures offering 9 percent interest payments, Schopp agreed to sign for a $50,000 bank loan (Tr. 327). In fact, he never received any debentures and was compelled to make payment upon the loan, although he never had received any of the proceeds (which had been deposited in the Ketteridge account) (Tr. 327-330).

4. In the fall of 1971 Ketteridge was indebted to A. Elgart and Sons, a New York manufacturer, in the amount of $58,000. Needing funds, Benjamin Elgart, president of the New York company, contacted Stewart, who (along with petitioner and Smith) previously had signed personal guarantees for over $100,000 to Elgart. As a means of paying off the $58,000 debt the parties agreed that Elgart would negotiate two unsecured $29,000 loans from North State Bank, to be deposited first in the Ketteridge account and then paid to Elgart, and that subsequent Ketteridge checks payable to Elgart would be de-

posited to the Elgart account in the bank to offset the debt (Tr. 280). Two of the three members of the loan committee rejected the Elgart application. However, at the personal direction of Smith, the loan was made and approved by the board of directors (Tr. 474-476). Ketteridge was unable to repay the Elgart debt (Tr. 281-282).

5. In April 1972 Ketteridge was closed by its creditors. Later that same month, on April 24, petitioner obtained a $40,000 loan on behalf of Burlington Real Estate; the proceeds were deposited in the Ketteridge account (Tr. 494, 495). That same day another $26,000 was deposited in the Ketteridge account via an unsecured $50,000 loan in the name of Smith's wife (Tr. 494-495).

6. As a result of all of these activities, between August 7, 1970, and April 24, 1972, the North State Bank had loaned $762,250 to or on behalf of Ketteridge (Tr. 496-499). A large portion of this amount was written off as uncollectible when the North State Bank merged with another bank late in 1972 (Tr. 620-627).

7. Petitioner did not regard as his own the obligations he had incurred for his corporations on behalf of Ketteridge Industries.[2] When he came to the bank to renew personal and business loans and to make interest payments, petitioner did not pay the

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[2] The three substantive counts upon which petitioner was convicted deal with the Schopp loan (count 17), the Elgart financing (count 18), and the $40,000 loan to Burlington Real Estate on April 24, 1972 (count 19).

interest on the Ketteridge-associated obligations; instead, he directed the loan officer to contact Smith, the bank's president, to obtain satisfaction (Tr. 300-301, 313-314). When petitioner furnished the Small Business Administration with a financial statement he made no mention of his liabilities on the Ketteridge loans (Tr. 542-546).

On November 29, 1972, petitioner was interviewed by FBI Agent Thomas Brereton concerning this discrepancy. After being advised of his rights and executing a waiver of rights form, petitioner told Brereton that he did not regard the loans made on behalf of Ketteridge as his own obligations; that he had expected to receive debentures from Ketteridge for each of the loans made in the name of Burlington Real Estate or Home Builders of Alamance; that he knew that the proceeds of the loans had been used to offset the Ketteridge deficit balance; that Smith had kept him advised of Ketteridge matters, knowing that petitioner was a major Ketteridge stockholder; that he had no part in the August 7, 1970, handling of the $260,000 Ketteridge loan; and that he accepted the April 24, 1972, loan on behalf of Burlington Real Estate in the hope of reopening Ketteridge after the creditors had closed it down (Tr. 552-565).

ARGUMENT

1. Each of the substantive counts upon which petitioner was convicted charged that petitioner, a bank director, "with intent to injure and defraud

the said Bank, did wilfully misapply and cause to be misapplied monies, funds and credits of said Bank * * *" (Pet. 5). Each count then set out the details of a separate loan. Count 17 charged that the misapplication was effected by causing a $50,000 loan to be made to John J. Schopp, with the proceeds deposited to the Ketteridge account, "concealing the purpose for the loan and concealing the interest of H. Calloway Pollard * * *" (*ibid.*). Count 18 charged that the misapplication was brought about by causing a $29,000 loan to be made to A. Elgart and Sons; Count 19 involved a misapplication related to the April 1972 loan of $40,000 to Burlington Real Estate. In each count petitioner was charged with concealing the purpose of the loan and his interest therein.

Relying primarily upon *United States* v. *Britton*, 107 U.S. 655, petitioner contends that the substantive counts were insufficient to state an offense. In *Britton* this Court ruled that an indictment charging a bank official with willful misapplication of bank funds by using the funds to buy the bank's own shares was insufficient because the charge failed to contain language negating the possibility that the transaction was within the statutory exception permitting such purchases to prevent bank losses on a debt. 107 U.S. at 669-670. As petitioner notes (Pet. 13), the Court in *Britton* also stated that because the term "willful misapplication" was new and had no technical meaning, an indictment could not simply aver that a defendant "willfully misapplied" bank

funds without showing "how the misapplication was made, and that it was an unlawful one."

In the 90 years since *Britton* was decided, the law of willful misapplication has undergone substantial development through lower court constructions of that term. It is now generally accepted that "willful misapplication" encompasses acts not covered by the terms "embezzlement" or "abstraction," but that amount to unjustified use of bank funds beyond mere bad judgment or maladministration. *United States* v. *Wilson*, 500 F.2d 715 (C.A. 5); *United States* v. *Gens*, 493 F.2d 216, 221-222 (C.A. 1); *United States* v. *Fortunato*, 402 F.2d 79 (C.A. 2), certiorari denied, 394 U.S. 933. It has, therefore, acquired a technical meaning. Moreover, the common law requirement of technical pleading has been eliminated since *Britton* by Fed. R. Crim. P. 7(c). Accordingly, an indictment such as the one in this case, which charges a violation of 18 U.S.C. 656 by tracking the statute and in addition by setting out in detail the manner in which petitioner intended to injure and defraud the bank, is sufficient. It fully notified petitioner of the charge he was required to meet, and it protected him from double jeopardy. *Hamling* v. *United States*, No. 73-507, decided June 24, 1974, slip op. 27; *Hagner* v. *United States*, 285 U.S. 427.

Petitioner contends that, although some circuits have held that Section 656 now has acquired a "technical" meaning, others continue to hold that it has not. See cases cited at Pet. 14-15. Although we agree with petitioner that there is a verbal dispute, that

dispute does not affect the manner in which the courts dispose of cases and so is more semantic than real. For example, the First Circuit, after expressing in *Gens, supra*, the view that the statute had not yet acquired a fully-articulated technical meaning, went on fully to articulate such a meaning. 493 F.2d at 222. *United States* v. *Quinn*, 365 F.2d 256 (C.A. 7), another case cited by petitioner as declining to find a technical meaning in Section 656, nevertheless held that an indictment could be sufficient if it contained allegations of fact (as opposed to an explanation of law) sufficient to show that the willful misapplication of funds was effected by disguised procedures detrimental to the bank. Neither *Gens* nor *Quinn* required the indictment to set out in full the legal theories that would support a conviction; instead, both cases held only that it was necessary to set out facts sufficient to show that the transaction was not an innocent, "everyday" banking matter. The indictment in this case complied fully with Section 656 as construed by *Gens* and *Quinn*. As the district court concluded (Pet. App. A, p. 9a):

> The Court finds that the present indictments sufficiently inform defendants of how the alleged misapplication took place and indicate why it was unlawful. The Court cannot read these indictments and come to the conclusion that only an ordinary banking transaction is charged. These indictments allege conversion and concealment as essential ingredients of the transactions.

2. Petitioner also alleges that the district court's instructions to the jury were inadequate because they did not tell the jury that it must conclude that his transactions exposed the bank to a foreseeable risk of loss, but instead allowed the jury to convict him if it were convinced simply that there had been a violation of some state or federal bank rule or regulation. This contention is not supported by the record. The court's instructions on the conspiracy and substantive counts set forth the elements of each offense, defined "misapplication" as an unauthorized, unjustified or wrongful use of the bank's assets by any of several delineated methods, admonished the jury that an intent to injure or defraud the bank was a necessary element of the offense, and cautioned that the offensive conduct must exceed maladministration and misuse and must include a conversion of the bank's funds to the defendant's or another's use, specifically intending to injure or defraud the bank (Tr. 861-872). The charge therefore was adequate under even the most stringent definitions of the offense. See *United States* v. *Giordano*, 489 F.2d 327 (C.A. 2); *United States* v. *Mayr*, 487 F.2d 67 (C.A. 5), certiorari denied *sub nom. Windham* v. *United States*, 417 U.S. 914; *United States* v. *Hickey*, 360 F.2d 127 (C.A. 7), certiorari denied, 385 U.S. 928.

The cases relied upon by petitioner (Pet. 16), including *Giordano* and *Gens*, *supra*, do not compel a court to instruct that a risk to the victimized bank of probable and foreseeable loss from the misappli-

cation is a circumstance that must be found in order to convict. *Giordano* holds only that an intent to injure the bank is an element of the offense and that such intent may be demonstrated by the deliberate making of a loan not authorized by the bank's rules (489 F.2d at 331). *Gens* holds that the transactions must have some tendency to injure the bank and that this may be proved by demonstrating that the nominal borrowers were not credit-worthy or that the bank looked only to the third-party recipient of the proceeds for satisfaction. The government demonstrated both of those elements at the trial in this case. *Gens* does not stand, as petitioner would have it, for the proposition that the court must instruct the jury that the loan subjected the bank to a "probable and foreseeable loss" (Pet. 16).

3. Petitioner contends that there has been an abuse of the grand jury process because subpoenas directing the North State Bank to make available its records could be satisfied by delivery of the records to the Federal Bureau of Investigation. This contention is without merit. Each subpoena directed the Bank to produce its records before a session of a grand jury on a date certain;[3] the provisions in the subpoenas allowing the Bank to satisfy each sub-

[3] We are lodging with the Clerk of this Court a transcript of the hearing concerning the grand jury subpoenas, and of the Joint Appendix on appeal from the district court's order declining to prohibit the production of the subpoenaed materials before the grand jury. Copies of the subpoenas are reproduced at pp. 10a-13a of the Joint Appendix.

poena by providing the documents to the Federal Bureau of Investigation was for the convenience of the Bank, which otherwise would have had to undertake the burden of transporting the documents. The Bank itself chose to provide the records to Agent Brereton of the Federal Bureau of Investigation and was not compelled to do so by the subpoenas.[4]

In any event, petitioner has no standing to object to the production before the grand jury of the materials obtained through these subpoenas. None of the documents produced was owned by petitioner and the subpoenas did not direct the bank to produce any of petitioner's personal record. He therefore cannot object to their production. *California Bankers Association* v. *Shultz*, 416 U.S. 21, 55. If any rights were violated, they were those of the Bank.[5] Cf.

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[4] Petitioner's contention (Pet. 8-9) that the subpoenas were issued in blank to the Federal Bureau of Investigation and filled in by the Federal Bureau of Investigation is completely unsupported by the record. Assistant United States Attorney William L. Osteen represented in open court (Tr. July 10, 1973, p. 16) "that I caused the subpoenas to be issued. It was done under my direction and under my supervision * * *." There is no evidence to the contrary.

[5] Petitioner specifically disclaims any argument that the subpoenas invaded his personal Fourth Amendment right to be free of unreasonable searches or seizures (Pet. 9-10); he seeeks to invoke only the rights of the bank. This case therefore is not comparable to *United States* v. *Miller*, 500 F.2d 751 (C.A. 5), in which grand jury subpoenas were issued by the United States Attorney for the records of a specific individual, and that individual raised his own Fourth Amendment claim when the records were introduced at trial. Nor does petitioner contend that Fed. R. Crim. P. 17, which

Alderman v. *United States*, 394 U.S. 165, 174-175. And, even if the subpoenas were improper, the presentation of the materials to the grand jury is not a proper ground to dismiss the indictment. Illegally seized evidence may be used before a grand jury, and "the validity of an indictment is not affected by the character of the evidence considered." *United States* v. *Calandra*, 414 U.S. 338, 344-345.

4. As is customary in the Middle District of North Carolina, the deliberations of the grand jury were not recorded. Recognizing that Fed. R. Crim. P. 6 permits, but does not compel, recordation of grand jury proceedings, petitioner nevertheless asserts that he is entitled to recordation and a full transcript of grand jury proceedings because he might have been indicted on one theory of violating 18 U.S.C. 656 and tried under another theory. Petitioner is not entitled to review the grand jury proceedings to satisfy this curiosity. The language of the indictment serves as a safeguard against conviction on a theory not examined by the grand jury. The indictment against petitioner "on its face presents evidence which assures us that such essential elements were presented to the [grand] jury and deliberated upon by them in returning the indictment." *United States* v. *Silverman*, 430 F.2d 106, 111 (C.A. 2), certiorari denied, 402 U.S. 953. The extensive allegations in the conspiracy

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authorizes the United States Attorney to utilize subpoenas signed in blank by the clerk of the court, is improper or unconstitutional.

count, which encompassed as overt acts all 18 substantive charges, amply show what conduct was deemed offensive by the grand jury. Any points of clarification could have been resolved by a bill of particulars, which petitioner did not request. Nothing in the indictment or evidence at trial even remotely implies that, like the cases relied upon by petitioner (Pet. 20) (*e.g.*, *United States* v. *Beard*, 436 F.2d 1084 (C.A. 5)), the offense proved was not the offense charged.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

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